United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-4179

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL TRADE COMMISSION

B
P/S

PETITION FOR REHEARING OR REHEARING IN BANC

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Petitioner
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

WILLIAM T. LIFLAND
IRA J. DEMBROW

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

THE FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL TRADE COMMISSION

PETITION FOR REHEARING OR REHEARING IN BANC

The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, hereby requests a rehearing or rehearing in banc of the Court's decision, based on its Slip Opinion dated June 21, 1977 ("the Opinion"), dismissing A&P's petition for review of an order of the Federal Trade Commission ("FTC" or "Commission") that A&P violated Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(f) (1970).*

We respectfully urge that the Opinion clearly failed to follow the Supreme Court's landmark decision in *Auto-*

---

* Section 2(f) precludes a buyer (here, A&P) from knowingly inducing an illegally discriminatory price from a seller (here, the Borden Company); under other provisions of Section 2, a discriminatory price is not illegal if it is offered to meet competition (§ 2(b)) or is cost justified (§ 2(a)). The Opinion was written by Senior Judge Anderson. Judge Meskill and Chief Judge Markey of the Court of Customs and Patent Appeals, sitting by designation, were the other panel members.

EDITOR'S NOTE

Pages 2 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

	Quarts	*Half Gallons*	*Gallons*
Bowman Quote (A3385-406)	$.1696	$.3136	$.6272
Borden Quote (A3489-510)	$.1712	$.3124	$.6248
Difference	($.0016)	$.0012	$.0024

Thus Bowman was lower on quarts by 1.6 mills while Borden was lower on half gallons and gallons by only 6/10ths of a mill per quart—or about *1/3* of *1%* of the quoted prices. Although A&P contends that Bowman's offer was in fact better than Borden's (because, *inter alia*, Bowman offered both Bowman label and private label products at the same prices), the accuracy and overall representativeness of the above comparison has never been disputed.

Nevertheless, the Opinion asserts that "A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (Slip Op. 4306 *et passim*). This is a clear misapprehension of the testimony of Mr. Herschel Smith, A&P's New York Headquarters buyer. Mr. Smith said that he compared the two offers he received from A&P's Chicago Unit in 1965, and found that "the difference was almost infinitesimal, it was so small" (A2018). The Chicago Unit recommended acceptance of the Borden offer on the basis that these small differences multiplied by a large anticipated volume of sales indicated that the Borden offer would be "substantially better" (A2018). However, looking at the actual prices, Smith concluded "It was a matter of mills. Maybe 'infinitesimal' isn't a good word there. It was small, mill differences" (A2018-19).

Another incontrovertible fact which the Opinion overlooks is that Borden's terms of sale and method of delivery to A&P were significantly different from the man-

EDITOR'S NOTE

Pages 4 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

initial offer was not "in the ballpark" when compared with the Bowman offer (Slip Op. 4292).*

The Commission held that it would be "contrary to the public interest" (Slip Op. 4295) to require buyers to disclose competing offers whenever sellers raise a "meeting competition caveat". While this conclusion was reached in the Commission's consideration of the charge under Section 5 of the FTC Act, 15 U.S.C. § 45, both that count and the 2(f) count were claims that A&P had violated "the policy of the Robinson-Patman Act" and were admittedly "based on the same conduct" (Slip Op. 4293). It would seem just as contrary to the public interest to impose on a buyer the obligation to either disclose the competitive offer or refuse the better offer whether Section 5 or Section 2(f) is invoked. Yet that obligation is the practical result of the decision here, since it effectively strips the buyer of all Robinson-Patman defenses (and imposes on the buyer an impossible burden of reconstructing a hostile seller's precise costs years after the events) whenever the seller asserts it is only meeting competition.

The Court reaches that mischievous result because of the fear, "admittedly the rare case", that if purchasers can choose between competing bids they may induce "predatory price cutting" (Slip Op. 4307). The Commission in this very case had the opposite fear; it wrote:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that

---

* It is equally true that an offer to increase the alleged overall "saving" by $50,000 would not have put Borden "in the ballpark" when Borden claimed its first offer would result in "savings" to A&P of $410,000, and on the same basis Bowman was offering savings of $737,000. Since both of these alleged savings were on dairy purchases totalling approximately $7,500,000, the "drop in the pocket" comment was also quite accurate (Slip Op. 4292).

such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (*The Great Atlantic & Pacific Tea Co., Inc.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,150 at 21,041 (FTC 1976)).

We respectfully submit that the Commission's concerns are more realistic and more consistent with *Automatic Canteen,* where the Supreme Court stated that expansive enforcement of Section 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63). It stated in part:

"putting the buyer at his peril whenever he engages in price bargaining. . . . must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74, footnote omitted)

The Opinion seeks to justify its anomalous result by reliance on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971), which until now had not been followed by any other court.* But the facts of this case (in which A&P has been exonerated of any charge of misleading the seller) show that *Kroger* (which the Sixth Circuit expressly stated turned on the affirmative misrepresentations of Kroger's buyer, 438 F.2d at 1377) is inapposite here. Ironically, the Opinion characterizes this

* It was ignored in *Rutledge* v. *Electric Hose and Rubber Co.*, 327 F. Supp. 1267, 1276 (C.D.Cal. 1971), *aff'd,* 511 F.2d 668 (9th Cir. 1975) ("since plaintiffs have shown no section 2(a) violation, the [buyer] defendants have not violated § 2(f)") and in *Harbor Banana Distributors, Inc.* v. *FTC*, 499 F.2d 395, 399 (5th Cir. 1974) ("A prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f)").

difference between a buyer's lying (in *Kroger*) and telling the truth (in this case) as "a fine one indeed" (Slip Op. 4309).

III.

The Decision Improperly Deprived A&P of the "Meeting Competition" and "Cost Justification" Defenses and Is in Clear Conflict With *Automatic Canteen.*

There was no finding by either the Commission or the Court that the Borden bid did not meet competition, *or* that it was not cost justified, *or* that it violated Section 2(a) of the Clayton Act, as amended. With respect to meeting competition, the Court held that because A&P *thought* Borden's prices were better (which would, of course, be so from the buyer's point of view in almost every case), "the Commission properly deprived A&P of Borden's potential 'meeting competition' defense" (Slip Op. 4310).*

Until now, the law in this Circuit and elsewhere had been clear that there is sufficient flexibility in the "meeting competition" defense that it is available even though the offer in fact *beats* the competitive price.** Similarly, the decision here breaks new ground when it effectively deprives a buyer of the "cost justification" defense by shifting the burden on this issue to A&P in contravention of

---

* This curious conclusion appears to have been based on Commission counsel's argument that the fraction of a mill difference was a substantial difference because of the large anticipated volume of A&P's purchases, and that a buyer should be punished for the evil *thought* that it was getting a substantially better deal—even though the actual price differences were well under 1%.

** *Kohner* v. *Wechsler,* 477 F.2d 666, 672-73 (2d Cir. 1973) (Timbers, J., concurring); *Samuel H. Moss, Inc.* v. *FTC,* 155 F.2d 1016 (2d Cir. 1946) (per curiam); *Forster Mfg. Co.* v. *FTC,* 335 F.2d 47 (1st Cir. 1964); *International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 726 (5th Cir. 1975); *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

Automatic Canteen. That case squarely stands for the proposition that where (as here) a buyer is served by different methods or buys in different quantities than his competitors, then in order to prove a 2(f) charge the Commission must show *both* that the buyer knew that he was receiving a substantial price advantage over his competitors *and* that the discrimination could not be justified under one of the seller's defenses. The Supreme Court stated with respect to the cost justification defense:

> "If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80)

Here, the Commission's decision repeatedly acknowledged that "there were differences in the way A&P and its competitors were served" (*A&P*, ¶ 21,150 at 21,042, 21,046).

The Supreme Court reached its conclusion in *Automatic Canteen* in a carefully reasoned opinion based on the premise that it is "apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . ." (346 U.S. at 70). It continued:

> "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

The Court concluded that the FTC has "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" (346 U.S. at 79). This result was based not only on "considerations of fairness and convenience" but on "the fact that the buyer does not have the

ADDENDUM

COMPARISON OF THE BOWMAN AND BORDEN QUOTATIONS FOR MAJOR MILK ITEMS IN CHICAGO-CALUMET AREA*

	Price Per Quart	Half Gallon	Gallon
[BORDEN'S ORIGINAL QUOTE (A3337)	$.1855	$.3430	$.6860]
BOWMAN'S QUOTE (A3393)	**$.1696**	**$.3136**	**$.6272**
BORDEN'S FINAL QUOTE (A3494)	**$.1712**	**$.3124**	**$.6248**
DIFFERENCE PER QUART	**($.0016)**	**$.0006**	**$.0006**

*This comparison disregards Bowman's quote being:
(a) for Bowman Brand or Private Label products at A&P's option,
(b) lower than Borden by over 10¢ on glass gallons, and
(c) at 3.5% butterfat content.

ties of purchases did not differ between Meyer and its competitors, *Automatic Canteen* did not require proof of the absence of cost justification. However, the FTC did introduce evidence of lack of cost justification which the Court found "weak but not insufficient" (359 F.2d at 365). In the present case, as we have seen, Borden's sales of private label milk to A&P were undeniably on different terms than those on which A&P's competitors purchased—in that the competitors received valuable delivery services and promotional, advertising, and other allowances and assistance not received by A&P. Thus, this case must be governed by the Supreme Court's holding in *Automatic Canteen* and not by any misapplication of the Ninth Circuit's ruling in *Fred Meyer*.

CONCLUSION

For the reasons stated above, and the arguments previously made by A&P, rehearing or rehearing in banc should be granted in the interests of justice and of avoiding unnecessary and improper restraints on competition in bargaining between buyers and sellers generally.

Dated: New York, N.Y.
July 5, 1977

Respectfully submitted,

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Petitioner
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

WILLIAM T. LIFLAND
IRA J. DEMBROW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. :

Petitioner, :

-v- : AFFIDAVIT OF SERVICE

THE FEDERAL TRADE COMMISSION, : 76-4179

Respondent. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT F. BELLUSCIO, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 5th day of July, 1977, I served two copies of the annexed Petition for Rehearing or Rehearing in Banc upon:

W. Baldwin Ogden, Esq.
Office of the General Counsel
Federal Trade Commission
Washington, D. C. 20580

by depositing true and correct copies thereof in the United States Post Office at 73 Pine Street, New York, N.Y., enclosed in a stamped, sealed envelope addressed to the above-mentioned attorney.

Robert F. Belluscio

Sworn to before me this
5th day of July, 1977

Peter Demmerle
Notary Public

PETER DEMMERLE
Notary Public, State of New York
No. 31-4640173
Qualified in New York County
Commission Expires March 30, 1979

Box 3

Petitioners

In

Re Hearing

En Banc

(F)

76-478

14 images

L-D

GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525